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Civil Forfeiture in New Jersey: Is the Taking of Assets from Criminal Defendants Morally and Ethically Just?

By Melissa Marler¹

I. Introduction

Professionals in law, psychology, philosophy, and criminal justice have long debated the efficacy of various forms of punishment for criminal offenders.² The challenge has been settling on a punishment that is proportional to the crime committed, has a deterring effect, and protects society from the wrong doings of the criminal offenders.

In New Jersey, law breakers face criminal prosecution which may, upon conviction, result in detention or some loss of freedom. However, research has suggested that for some crimes, loss of freedom holds little deterrent effect.³ Drug crimes which yield a high monetary income for the dealer as well as crimes which are the result of a psychological maladjustment are unlikely to be prevented by loss of freedom punishment. Detainment and loss of freedom for a drug dealer bringing in millions is likely not enough to prevent that individual from recommitting the crime. Drug dealers likely do not have the skills or education to obtain legitimate, gainful employment once they are released. This all pushes these individuals to recommit.⁴

¹ The author is currently a 2L Day Student at Seton Hall University School of Law. At the time of this writing, the author had recently completed a summer internship with the Ocean County Prosecutor's Office's Forfeiture Unit.

² The term "offender" will be used throughout this paper. It should be mentioned that the offender need only to be charged with the crime. The offender need not be convicted for the prosecuting agency to seize assets.

³ Steven N. Durlauf & Daniel S. Nagin, *The Deterrent Effect of Imprisonment*, Controlling Crime: Strategies and Tradeoffs 43-94 (2010).

⁴ *Id.*

In response to the above-mentioned conundrum, New Jersey law makers enacted civil forfeiture statutes which allowed not only criminal action against the defendant, but civil action which allows prosecution agencies to seize certain property of the offender.

II. The History of Civil Forfeiture in The United States and Abroad

Civil Forfeiture was born from the British Navigation Acts of the 1600's. This practice was exercised in an attempt to promote England's maritime power by seizing any vessels and cargo within that did not comply with England's regulations. If a vessel was transporting British goods but not flying under the British flag, the vessel and the goods would be seized and forfeited to the crown regardless of innocence or legal ownership. In many instances, the goods on the vessel, or even the vessel itself, would be owned by a person overseas. The British crown treated the property (i.e. the vessel and the goods) as the wrongdoer, since in many cases apprehending the rightful owner was not possible.⁵

Like many other legal practices, the 17th century British forfeiture laws were adopted in some part by the first United States Congress.⁶ The primary purpose of forfeitures at this time was to help in the collection of customs duties. In most cases, these early American forfeiture laws were applied to admiralty, piracy, and customs cases involving noncompliant vessels and/or goods. Collecting customs duties, or in the alternative seizing noncompliant property, was especially

⁵ Nick Sibilla, Leaked Handbook Reveals How ICE Uses Civil Forfeiture to Seize Millions Forbes (2017), <https://www.forbes.com/sites/instituteforjustice/2017/10/16/leaked-han...-reveals-how-ice-uses-civil-forfeiture-to-seize-millions/#5e58d747498c>.

⁶ Ronald Lampard, After 500 years, civil asset forfeiture reform long overdue The Hill (2017), <http://thehill.com/blogs/pundits-blog/civil-rights/329760-after-500-years-civil-asset-forfeiture-reform-long-overdue>.

important to the United States as these funds accounted for nearly ninety percent of the federal government's finances at this time.⁷

Early American government and the judiciary were supportive of the early forfeiture laws. In an early forfeiture case, *United States v. The Brig Malek Adhel*, Justice Story of the high court upheld civil forfeiture laws in the United States and went on to explain that the practice of forfeiture is "from the necessity of the case, as the only adequate means of suppressing the offense or wrong, or insuring an indemnity to the injured party."⁸

American law continued to embrace forfeiture law throughout the decades. In the Prohibition Era the government utilized forfeiture law to seize vehicles used in transporting illegal liquor. During Reagan's presidency and the war on drugs, civil forfeiture gained momentum and support from law makers and law enforcement alike. Since then the practice has expanded. Civil forfeiture laws have changed to allow law enforcement to seize more types of property as well as keep more of the profits. According to the U.S. Department of Justice the Asset Forfeiture Fund took in \$93.7 million in forfeited assets. The attractiveness of the practice has become widespread in the law enforcement community, exhibited in the Asset Forfeiture Fund taking in approximately \$4.5 billion in 2014.⁹

⁷ Nick Sibilla, *Leaked Handbook Reveals How ICE Uses Civil Forfeiture To Seize Millions* Forbes (2017), <https://www.forbes.com/sites/instituteforjustice/2017/10/16/leaked-han...-reveals-how-ice-uses-civil-forfeiture-to-seize-millions/#5e58d747498c>.

⁸ *Id.*

⁹ Ronald Lampard, *After 500 years, civil asset forfeiture reform long overdue* The Hill (2017), <http://thehill.com/blogs/pundits-blog/civil-rights/329760-after-500-years-civil-asset-forfeiture-reform-long-overdue>.

III. New Jersey Civil Forfeiture Law

In 1978 New Jersey enacted N.J. Stat. § 2C:64-1 which essentially gives law enforcement the right to seize certain property from criminal defendants. N.J. Stat. § 2C:64-1 allows the State or law enforcement to seize property that is considered prima facie contraband,¹⁰ evidence for pending criminal prosecution,¹¹ and property upon which the state brings a civil forfeiture action against the property in rem.¹²

If the seized property is not prima facie contraband, it may still be subject to forfeiture if it meets certain criteria. If the property has been, or was intended to be, utilized in furtherance of an unlawful activity, intended to become an integral part of illegal activity, or is determined to be proceeds of illegal activities, a proper action for civil forfeiture action may be brought against the property.¹³

During the course of an investigation, law enforcement may seize certain property. Law enforcement officers are authorized to seize and ultimately destroy prima facie contraband such as drugs and deadly weapons.¹⁴ However, law enforcement officers are also authorized to seize property that has been, or was intended to be, utilized in furtherance of an unlawful activity, intended to become an integral part of illegal activity, or is determined to be proceeds of illegal activities. In New Jersey, most commonly the type of property seized by law enforcement officers

¹⁰ Prima facie contraband includes Controlled dangerous substances, firearms which are unlawfully possessed, carried, acquired or used, illegally possessed gambling devices, untaxed or otherwise contraband cigarettes or tobacco products, untaxed special fuel, unlawful sound recordings and audiovisual works and items bearing a counterfeit mark.

¹¹ Must be pursuant to section 2c: 64-4

¹² In rem proceedings are against the property itself, not against the criminal defendant. However, the criminal defendant must be listed as an interested party. Further, anyone with any interest in the property must be listed as an interested party.

¹³ N.J. Stat. § 2C:64-1 (LexisNexis, Lexis Advance through New Jersey 217th Second Annual Session, L. 2017, c. 237 (except c. 231), and J.R. 18)

¹⁴ See *supra* note 5.

is currency and motor vehicles. However, there are some landmark cases against real property, computers, electronics, and even jewelry.¹⁵

Law Enforcement officers have other criteria that must be met in order to seize property. First, the underlying offense must be an indictable offense. Disorderly persons offenses do not give law enforcement authorization to seize property that is not prima facie contraband.¹⁶ For example, in New Jersey, possessing the controlled dangerous substance, Marijuana, is a criminal offense. However, possessing under fifty (50) grams of marijuana is merely a disorderly person's offense, which may be adjudicated at the municipal level. In this case, the law enforcement officer would have authority to seize the marijuana which is prima facie contraband, but not a vehicle used to transport drugs or even currency obtained by selling drugs. On the other hand, possessing over fifty (50) grams of marijuana is an indictable offense, giving rise to seizure of the prima facie contraband as well as any property that meets the criteria of N.J. Stat. § 2C:64-1.

Seized property is then held by law enforcement agencies and the civil action against the property is brought by the county prosecutor's office. The county prosecutor's office has ninety

¹⁵ See State v. One House, 346 N.J. Super. 247, 787 A.2d 905 (Super. Ct. App. Div. 2001). A case in which the issue was the partial in rem forfeiture order of a non-divisible asset, a house and lot because the Defendant was caught growing marijuana plants in various rooms of the house.

¹⁶ See State v. Seven Thousand Dollars, 136 N.J. 223, 642 A.2d 967 (1994). A case in which the defendant was charged with possessing drug paraphernalia, a disorderly persons offense. The state filed a civil forfeiture action against the alleged proceeds from selling drugs. The court found no connection between the money and an indictable offense. The court then reversed and remanded for an order to vacate the forfeiture because of the state's failure to prove a direct, causal connection between the money and an indictable offense.

(90) days from the date of seizure to bring an action against the property.¹⁷ Once the action is brought, the case proceeds like any other in rem civil suit in its respective division.¹⁸

It is common for certain types of property, mainly motor vehicles, to have multiple interested parties. For example, in a landmark New Jersey Supreme Court case, a son, who committed a theft, borrowed his father's motor vehicle to commit the offense.¹⁹ In cases such as this, both the son, the criminal offender, and the father, the registered owner of the vehicle, must be listed as interested parties in the action and receive formal notice of the action.

New Jersey has some of the most lenient civil forfeiture statutes in the nation, falling in favor of law enforcement and prosecuting agencies.²⁰ Once the property has been seized and a civil forfeiture action has been filed on said property, the prosecuting agency may request a use order from the court.²¹ A use order allows either the seizing law enforcement agency or prosecuting agency to utilize the property, most commonly a motor vehicle, for law enforcement purposes.

¹⁷ N.J. Stat. § 2C:64-3 (LexisNexis, Lexis Advance through New Jersey 217th Second Annual Session, L. 2017, c. 237 (except c. 231), and J.R. 18). "Whenever any property other than prima facie contraband is subject to forfeiture under this chapter, such forfeiture may be enforced by a civil action, instituted within 90 days of the seizure and commenced by the State and against the property sought to be forfeited."

¹⁸ *Id.*

¹⁹ *State v. 1979 Pontiac Trans Am*, 98 N.J. 474, 487 A.2d 722 (1985)

²⁰ S.P. Sullivan, *N.J. laws allowing cops to seize assets among 'worst in country,' report finds* (November 14, 2015) http://www.nj.com/politics/index.ssf/2015/11/nj_cops_seize_millions_a_year_re.html

²¹ N.J. Stat. § 2C:64-3 (LexisNexis, Lexis Advance through New Jersey 217th Second Annual Session, L. 2017, c. 237 (except c. 231), and J.R. 18). The prosecuting agency with approval of the entity funding such agency, or any other entity, with the approval of the prosecuting agency, where the other entity's law enforcement agency participated in the surveillance, investigation or arrest which is the subject of the forfeiture action, may apply to the Superior Court for an order permitting use of seized property, pending the disposition of the forfeiture action provided, however, that such property shall be used solely for law enforcement purposes. Approval shall be liberally granted but shall be conditioned upon the filing of a bond in an amount equal to the market value of the item seized or a written guarantee of payment for property which may be subject to return, replacement or compensation as to reasonable value in the event that the forfeiture is refused or only partial extinguishment of property rights is ordered by the court.

This practice is done before the civil forfeiture is adjudicated, and prior to the interested parties' rights being forfeited. Further, the statute states that use orders should be liberally granted,²² giving even more power to the prosecuting agencies and law enforcement.

The civil action against the property runs parallel with the criminal action against the offender. However, "the fact that a prosecution involving seized property terminates without a conviction does not preclude forfeiture proceedings against the property pursuant to this chapter."²³ Meaning that the individual need not be *convicted* of the offense, they only need to be *charged* with the offense. Further, if the fact finder holds that the criminal defendant did not commit the offense, that has essentially no effect on the civil forfeiture action against the property. While it is certainly likely that a defendant would use his or her acquittal in the criminal case as evidence to convince the fact finder in the civil case that there is not a valid forfeiture action against the property, it does not ultimately bar the action against the property. This could mean for some defendants, having to defend a separate action by the state even though they have already proven their innocence. This could cost individuals time and money, as well as expose them to the stress and uncertainty of the court system. Further, it should be noted that criminal defendants are not entitled to a public defender in a civil forfeiture action and are unlikely to qualify for legal aide because of the underlying criminal offense.

If the offender is convicted of the crime in the criminal action, the state is able to use the conviction as rebuttable presumption that the property was utilized in furtherance of an unlawful activity.²⁴ Although both the state and the criminal defendant have the right to present either a

²² *Id.*

²³ N.J. Stat. § 2C:64-4 (LexisNexis, Lexis Advance through New Jersey 217th Second Annual Session, L. 2017, c. 237 (except c. 231), and J.R. 18)

²⁴ N.J. Stat. § 2C:64-3 (LexisNexis, Lexis Advance through New Jersey 217th Second Annual Session, L. 2017, c. 237 (except c. 231), and J.R. 18). Evidence of a conviction of a criminal

conviction or an acquittal as evidence in the civil forfeiture action, it does seem to benefit the prosecuting agency more so than the criminal defendant.

The New Jersey Civil Forfeiture Statute contains an “innocent owner” provision which is aimed at protecting parties that unwillingly or unknowingly lend property to individuals intending to commit crimes with the property.²⁵ This section protects parties such as lessors and businesses which lease or rent property, mainly cars and real estate, to persons who then conduct illegal activities in or with such property. In a situation where a person was using a leased vehicle for transporting large amounts of controlled dangerous substances, the state would not have a valid civil forfeiture action against the vehicle so long as the lessor, likely a large bank or motor vehicle company, did not have knowledge of such illegal activity. Because most all motor vehicle lease agreements contain a provision prohibiting illegal activity with the leased property, in this situation the vehicle would be returned to the lessor.²⁶

This section of the statute also aims to protect innocent owners such as parents, spouses, or even friends of the offender. The stipulation in the statute requires that the individual not be involved or aware of the illegal activity as well as do all that could reasonably be expected to prevent the illegal activity with the property.²⁷ In order to be deemed an “innocent owner” and prevail in the forfeiture action, the individual with interest in the property must prove, beyond a preponderance of the evidence, that they meet the exceptions listed in the statute.²⁸

offense in which seized property was either used or provided an integral part of the State’s proofs in the prosecution shall be considered in the forfeiture proceeding as creating a rebuttable presumption that the property was utilized in furtherance of an unlawful activity.

²⁵ N.J. Stat. § 2C:64-5 (LexisNexis, Lexis Advance through New Jersey 217th Second Annual Session, L. 2017, c. 237 (except c. 231), and J.R. 18)

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* Property seized under this chapter shall not be subject to forfeiture if the owner of the property establishes by a preponderance of the evidence that the owner was not involved in or

The incentive for law enforcement to seize property used for unlawful purposes goes beyond punishing offenders. Forfeited property, as well as proceeds from any forfeited property is distributed among the seizing law enforcement agency and the prosecuting agency.²⁹ These funds and/or property may only be used for law enforcement purposes. The New Jersey Legislature also set forth provisions in the statute that would require prosecuting agencies to donate funds and/or property to state agencies, charities, or organizations. As noted in the statute, five percent of the proceeds from forfeiture actions brought by the Attorney General's Office shall be donated to the Hepatitis Inoculation Fund.³⁰ Further, "[a]ny weapon with present or historical military value that has been forfeited pursuant to the provisions of chapter 64 of Title 2C of the New Jersey Statutes may be donated to the National Guard Militia Museum of New Jersey at Sea Girt by the law enforcement agency retaining it."³¹

Once the civil forfeiture suit has been adjudicated, the property will either be returned to the alleged offender, or if the state prevails, the title will vest with the state or the law enforcement

aware of the unlawful activity and that the owner had done all that could reasonably be expected to prevent the proscribed use of the property by an agent. A person who uses or possesses property with the consent or knowledge of the owner is deemed to be the agent of the owner for purposes of this chapter.

²⁹ N.J. Stat. § 2C:64-6 (LexisNexis, Lexis Advance through New Jersey 217th Second Annual Session, L. 2017, c. 237 (except c. 231), and J.R. 18). "The prosecutor or the Attorney General, whichever is prosecuting the case, shall divide the forfeited property, any proceeds resulting from the forfeiture or any money seized pursuant to this chapter with any other entity where the other entity's law enforcement agency participated in the surveillance, investigation, arrest or prosecution resulting in the forfeiture, in proportion to the other entity's contribution to the surveillance, investigation, arrest or prosecution resulting in the forfeiture, as determined in the discretion of the prosecutor or the Attorney General, whichever is prosecuting the case. Notwithstanding any other provision of law, such forfeited property and proceeds shall be used solely for law enforcement purposes, and shall be designated for the exclusive use of the law enforcement agency which contributed to the surveillance, investigation, arrest or prosecution resulting in the forfeiture."

³⁰ *Id.*

³¹ N.J. Stat. § 2C:64-9 (LexisNexis, Lexis Advance through New Jersey 217th Second Annual Session, L. 2017, c. 237 (except c. 231), and J.R. 18).

agency that seized the property.³² New Jersey statute of limitations bars claims from “innocent owners” after 3 years have passed from the date of seizure unless the individual can prove certain conditions prevented them from participating in the civil forfeiture action.³³

IV. Criticism of Civil Forfeiture Laws and Practices

The increase in proceeds from civil forfeiture can be attributed to several factors; a low standard of proof required to seize property; financial incentivization for law enforcement; and the lack of opposition law enforcement agencies typically face in a forfeiture action.

a. *Guilty Until Proven Innocent*

Unlike criminal defendants who benefit from the highest burden of proof required for conviction, defendants and interested parties in civil forfeiture actions are considered *guilty until proven innocent* and are only protected by the low burden of proof.

In seizing property, law enforcement officers are only required to find and present probable cause that the property to be seized is being utilized in criminal activity. Once probable cause is established, the burden then shifts to the interested party (as the actual defendant is the property in question) to prove their innocence. Further, once at trial the government is only required to present evidence that meets the “preponderance of the evidence” standard. Meaning that the officers must show that it is more likely than not (i.e. at least a 51% chance) that the property was being utilized


³² N.J. Stat. § 2C:64-7 (LexisNexis, Lexis Advance through New Jersey 217th Second Annual Session, L. 2017, c. 237 (except c. 231), and J.R. 18). “Title to property forfeited under this chapter shall vest in the entity funding the prosecuting agency involved at the time the item was utilized illegally, or, in the case of proceeds, when received.”

³³ N.J. Stat. § 2C:64-8 (LexisNexis, Lexis Advance through New Jersey 217th Second Annual Session, L. 2017, c. 237 (except c. 231), and J.R. 18). “Any person who could not with due diligence have discovered that property which he owns was seized as contraband may file a claim for its return or the value thereof at the time of seizure within 3 years of the seizure if he can demonstrate that he did not consent to, and had no knowledge of its unlawful use. If the property has been sold, the claimant receives a claim against proceeds.”

in criminal activity.³⁴ Preponderance of the evidence standard falls below even ‘clear and convincing’, the burden of proof required in contract disputes, cases in involving fraud, and various other types of civil and criminal matters.³⁵

Because of the low burden of proof, it is not surprising that nearly 80% of civil forfeiture actions occur absent a criminal conviction.³⁶

Below is a chart depicting the different burdens of proof as required state by state.³⁷



Prima Facie/Probable Cause	Alabama, Alaska, Delaware, Illinois, Massachusetts, Missouri, Montana, Rhode Island, South Carolina, Wyoming
Probable Cause and Preponderance of the Evidence	Georgia, North Dakota, South Dakota, Washington
Preponderance of the Evidence	Arizona, Arkansas, Hawaii, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Mississippi, New Hampshire, New Jersey, Oklahoma, Pennsylvania, Tennessee, Texas, Virginia, West Virginia
Preponderance of the Evidence and Clear and Convincing	Kentucky, New York, Oregon
Clear and Convincing	Colorado, Connecticut, Florida, Minnesota, Nevada, New Mexico, Ohio, Utah, Vermont
Clear and Convincing and Beyond a Reasonable Doubt	California
Beyond a Reasonable Doubt	Nebraska, North Carolina**, Wisconsin

* Most commonly, in states with two forfeiture standards, the higher one is for the forfeiture of real property.

** State law effectively does not have civil forfeiture.

³⁴ Preponderance of the Evidence, Legal Information Institute, https://www.law.cornell.edu/wex/preponderance_of_the_evidence.

³⁵ Clear and Convincing Evidence, Legal Information Institute, https://www.law.cornell.edu/wex/clear_and_convincing_evidence

³⁶ Marian R. Williams et al., *Policing for Profit*, Institute for Justice (2010).

³⁷ *Id.*

b. *Policing for Profit*

It was one of founding fathers, Benjamin Franklin that once said that the only two certainties we will find in this life are death and taxes.³⁸ Forfeiture is essentially a tax. Politicians and policy makers face an ongoing dilemma: legalize a substance and tax it or ban and item and fine the wrongdoer. In either scenario, the government will benefit financially. However, whereas you may find many that oppose taxing citizens, you will find few that don't condone punishing wrongdoers.³⁹

Civil forfeiture benefits the government in two ways: (1) provides a financial benefit to the seizing agencies and (2) increases the costs of prohibited substances or activities, thus, hopefully, decreasing criminal activity.

In questioning the purpose of civil forfeiture law, one must consider what happens with the assets after they are seized. In nearly all cases the assets are deposited with the County or State in which they are seized and either (i) a percentage of the funds or profits or (ii) the property itself, is distributed to the seizing agency. The stipulation is that the funds or property shall only be used for "law enforcement purposes". However, the statute fails to define "law enforcement purposes" which allows the seizing agency to use their own discretion in determining what is an appropriate use for the funds. In Texas, public records indicate that the District Attorney used forfeiture funds for a popcorn machine, candy, catering, and \$14,000.00 for a training seminar in Hawaii for the staff. Although there is no clear definition of "law enforcement purposes", agencies are held accountable for their spending of forfeiture funds. In Camden County, Georgia, Sheriff Bill Smith

³⁸ Brainy Quote, Brainy Quote, https://www.brainyquote.com/topics/death_and_taxes.

³⁹ Donald J. Boudreaux & Adam C. Pritchard, Civil Forfeiture as a "Sin Tax" Policy Reports (1996), http://www.independent.org/publications/policy_reports/detail.asp?id=3.

has been investigated for alleged misuse of forfeiture funds by using \$3 million to build a substation; \$250,000.00 to fund a scholarship at the Sherriff's alma mater, \$90,000.00 for a sports car, \$79,000.00 for a boat, and other forfeiture funds to pay for inmates to work on his property, his girlfriend's property, and his ex-wife's property. Over the course of 15 years Sherriff Smith has overseen and directed the seizure of \$20 million. Sherriff Smith lost his position in 2008.⁴⁰

This provision in the statute may prompt law enforcement agencies to be more aggressive in their seizing activities. One such agency, The U.S. Immigration and Customs Enforcement (ICE) Homeland Security Investigations (HSI) has a "Asset Forfeiture Handbook" which was leaked in October 2017. The handbook instructed agents on how to maximize profit in seizing property and evaluate property on a case-by-case basis to determine if the value in the property outweighs the liability and costs incurred in the seizing and forfeiture process. The handbook outlines six key factors in assessing if seizure of the property is appropriate: "(1) the assessed value, (2) known liens, (3) the probable equity, (4) possible environmental problems, (5) the existence of sufficient probable cause for seizure, and (6) the ability to overcome possible defenses to the forfeiture." ICE's handbook and detailed seizing instructions have yielded a major profit for the agency. The Government Accountability Office reported that from 2003 to 2013, ICE and other agencies in the Department of Homeland Security contributed \$3.6 million to the Treasure Forfeiture Fund. Approximately half of these funds have been contributed by ICE specifically.⁴¹

Law enforcement agencies are notoriously underfunded. As such, many of these agencies have become dependent on civil forfeiture funds. In a survey of nearly 800 law enforcement

⁴⁰ Marian R. Williams et al., *Policing for Profit*, Institute for Justice (2010).

⁴¹ Nick Sibilla, *Leaked Handbook Reveals How ICE Uses Civil Forfeiture To Seize Millions* Forbes (2017), <https://www.forbes.com/sites/instituteforjustice/2017/10/16/leaked-han...-reveals-how-ice-uses-civil-forfeiture-to-seize-millions/#5e58d747498c>.

agencies, nearly 40 percent reported that civil forfeiture funds were a necessary budget supplement. This reliance also occurs at the federal level. The department of Justice has urged its lawyers to “increase their civil forfeiture efforts as to meet the Department’s annual budget targets.”⁴²

Taking funds from criminals is not as much of a concern as where the funds end up. Incentivizing civil forfeiture and the seizing of assets has the potential to cause law enforcement officers to over-enforce offenses that give rise to seizure. This may also lead to neglect of other, just as important, law enforcement objectives. This can be seen in states where law enforcement agencies receive a larger percentage of the profits of civil forfeiture; many of the arrests within the state are drug-related, an offense that in many cases calls for seizure of assets.⁴³ [See table below: percentage of profits distributed to seizing agencies by state].⁴⁴ One must question if this is a causal or casual connection. Is the increase in drug arrests stemming from the current opioid crisis in the United States? Or is it the potential financial gain that is pushing law enforcement agencies to pursue drug arrests? If it is the latter, one must also question whether it is immoral or unethical to pursue drug arrests. If an individual is committing a drug related offense, don’t they deserve to be punished for their wrongdoing regardless of the law enforcement agency’s possible secondary motives? Questions such as these are answered below in the moral appraisal section.

⁴² Marian R. Williams et al., *Policing for Profit*, Institute for Justice (2010).

⁴³ *Id.*

⁴⁴ *Id.*

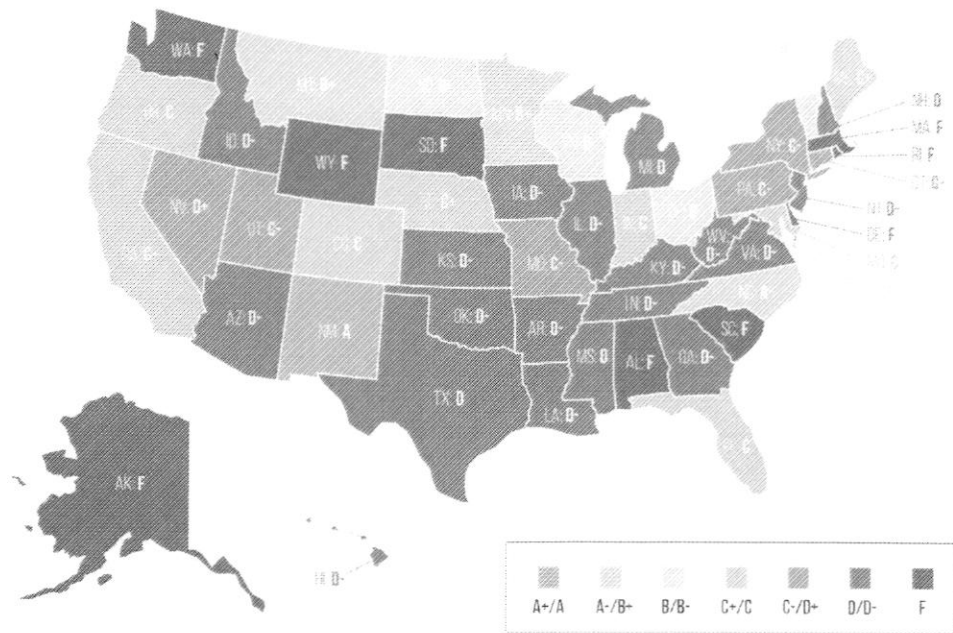
0%	Indiana, Maine, Maryland, Missouri, North Carolina, North Dakota, Ohio, Vermont
50%	Colorado, Wisconsin
60%	Connecticut, New York
63%	Oregon
65%	California
75%	Nebraska
80%	Louisiana, Mississippi
85%	Florida
90%	Illinois, Minnesota, New Hampshire, Rhode Island, Texas
95%	South Carolina
100%	Alaska, Alabama, Arkansas, Arizona, Delaware, Georgia, Hawaii, Idaho, Iowa, Kansas, Kentucky, Massachusetts, Michigan, Montana, Nevada, New Jersey, New Mexico, Oklahoma, Pennsylvania, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia, Wyoming

c. *Lack of Opposition*

More often than not, interested parties in a civil forfeiture action are also defending a criminal action. Because many attorneys practice either civil or criminal law, it is not always the case that a defendant's criminal defense attorney will represent their interests in a civil forfeiture case. Further, if the individual has limited resources they are likely to use such funds to fight for their liberty instead of fighting for their assets. Regardless of whether or not an individual is also the defendant, or whether they are an "innocent owner", interested parties in the assets involved in a civil forfeiture action face great obstacles in reclaiming their property. Especially for indigent individuals, the burdens of a legal battle are often too much and they do not challenge the government. Even for those that are able to afford legal representation, sometimes the time, attorneys fees, and other expenses needed to fight the forfeiture far outweigh the value of the property. Because the public defender does not take on civil cases and legal aid is unlikely to offer

assistance, there are many times that the interested party does not challenge the action and the government receives the assets by default.⁴⁵

V. *Refinement of Modern Civil Forfeiture Laws and Practices*



Various aspects of Civil Forfeiture law, both at the state and federal level have been the subject of scrutiny by the legal and academic communities. In response to this opposition and criticism, law makers at the state and federal levels have made changes to existing civil forfeiture laws that protect the purpose of the laws as well as the rights of the people. Such refinements in civil forfeiture law are discussed below:

⁴⁵ Marian R. Williams et al., *Policing for Profit*, Institute for Justice (2010).

a. *Innocent Owner Defense*

The 1996 case, *Bennis v. Michigan*, was the case that prompted outcry for a right to an innocent owner defense. In *Bennis*, a husband used his wife's car without her knowledge or consent to engage in illegal activity. This illegal activity just happened to be soliciting a prostitute. The husband was arrested and the vehicle was seized. The wife was not entitled for an innocent owner defense even though it is hard to imagine that she would knowingly consent to give her husband access to her car to soliciting paid-for sex. The case made it up to the Supreme Court where it was ruled that there was no innocent owner defense available to Mrs. Bennis and the subject was properly forfeited to law enforcement.⁴⁶

The unpopular ruling in *Bennis* prompted the 2000 Civil Asset Forfeiture Reform Act (CAFRA) which included an innocent owner defense that applied to all federal forfeiture actions. Further, all states that did not have an innocent owner defense then passed legislation barring civil forfeiture of assets from an innocent owner. Although entitled to this defense, the burden of proof still, in most states, falls on the innocent owner to prove their innocent. Thirty-eight states place the burden of proof on the innocent owner, thus employing the standard of "guilty until proven innocent."⁴⁷

⁴⁶ Marian R. Williams et al., *Policing for Profit*, Institute for Justice (2010).

⁴⁷ *Id.* In the following states the burden is on the government to prove the interested party's guilt: California, Colorado, Florida, Kansas, Michigan, Oregon. In the following states the burden is on the owner to prove their innocence: Alaska, Arizona, Arkansas, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming.

b. Public Accountability: Freedom of Information

Only twenty-nine states require law enforcement to collect and report on forfeiture data. In many of these states, it is fairly difficult to find out information or collect data on the use and proceeds of civil forfeiture. Some states offer the opportunity to submit freedom of information or Open Public Records Act (OPRA) requests, however, reportedly this process sometimes provided unusable or meager data.⁴⁸

Specifically, New Jersey law enforcement agencies are not required to collect or report on data for civil forfeitures.⁴⁹

c. Profit Sharing with Federal Agencies

2015 Attorney General Eric Holder policy preventing local law enforcement from using federal forfeiture laws to circumvent more restrictive state forfeiture laws. However, in July 2017, Attorney General Jeff Sessions announced that he planned to expand the use of civil forfeiture, specifically reversing the 2015 ban on profit sharing.⁵⁰

VI. Finnis, Natural Law, and Natural Rights

a. The Basic Goods

Finnis's theory of natural law and natural rights rests on a set of seven fundamental goods for humankind:

⁴⁸ Marian R. Williams et al., *Policing for Profit*, Institute for Justice (2010).

⁴⁹ *Id.*

⁵⁰ Kanya Bennett, The House Tells Sessions' Justice Department Not Stand for Civil Asset Forfeiture UCLU(2017), <https://www.aclu.org/blog/criminal-law-reform/reforming-police-practices/house-tells-sessions-justice-department-it-will>.

1. *Life*

The first basic good is life. This good encompasses all which pushes one to self-preservation, i.e. bodily health, mental health, and freedom from pain.⁵¹

2. *Knowledge*

Finnis urges one to desire participation in this basic good for its own sake, not solely as an instrument or product of participating in another basic good.⁵²

3. *Play*

Play can be “solitary or social, intellectual or physical, strenuous or relaxed, highly structured or relatively informal, conventional or *ad hoc* in its pattern. Finnis suggests that play can be participated in in a traditional sense for fun (e.g. playing golf with your friends) or in a more structured way (e.g. drafting an enactment).⁵³

4. *Aesthetic experience*

Commonly through play, one participates in aesthetic experience. However, aesthetic experience is not dependent on play, therefore, it is its own basic good. Aesthetic experience can be participated in as one values their work, creation, or appreciation of some natural occurrence.⁵⁴

5. *Friendship & Sociability*

Friendship and sociability has a wide range of possible participation which ranges from membership in a community to full friendship. Friendship, the highest form of

⁵¹ John Finnis, *Natural Law & Natural Rights* 85-89 (Oxford University Press, Second Edition 2011).

⁵² Id.

⁵³ Id.

⁵⁴ Id.

participation in this basic good, involves acting for the sake of one's friend's wellbeing and purposes.⁵⁵

6. *Practical Reasonableness*

To participate in practical reasonableness one must use their intelligence to shape one's character and in choosing one's actions and lifestyle. This basic good has two elements: (i) an internal aspect which involves inner peace, not brought on by drugs and actively being sought, and (ii) an external aspect which involves making actions that are authentic. Authenticity is found through autonomy, preferences, hopes, and self-determination. This basic good involves freedom, reason, integrity and authenticity. Practical reasonableness, as it relates to evaluating the morality of law, is discussed in more detail below.⁵⁶

7. *Religion*

This basic good involves our concern about an order of thing that transcends our individual interests. Finnis suggests that this basic good is not necessarily a religion per se (i.e. one does not have to identify as a Christian and attend church every Sunday, identify as a Muslim and live in accordance with the Quran, etc. to participate in this basic good).⁵⁷

These basic goods serve as the reasoning behind why we do certain things. They are also self-evident, meaning that they are not derived from personal inclination, logic, or even God's law. The basic goods are in the realm of reality and practical reason. They help individuals decide what is best for them. Finnis explains that in order to be good, one must respect these basic goods.

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ Id.

Finnis distinguishes between theoretical reasoning, what is true, and practical reason, which sets forth how to act.⁵⁸

b. Practical Reasonableness

Finnis takes an in-depth look at practical reason, one of the basic goods. He explains that this good prompts individuals to make rational decisions that increase the other basic goods in your life. In order to correctly participate in practical reasoning one must fulfill the following requirements:

1. Adopting a Rational plan of life

Having a rational plan of life means effectively committing to various practice for the sake of the basic goods. Finnis urges that this plan should not be set in stone, nor carried out on a whim. Rather, it should be liquid, carefully considered but open to new opportunities to participate in a new basic good. The goal is to harmoniously participate in a various practices for the sake of the basic goods.⁵⁹

2. No Arbitrary Preferences Amongst Values

You naturally have to prioritize certain goods over others (e.g. an academic would prioritize knowledge higher than a trade), but you should always do so with good reason. You should never arbitrarily discount one of the basic goods.⁶⁰

⁵⁸ Id.

⁵⁹ Id.

⁶⁰ Id.

3. No Arbitrary Preferences Amongst Persons

Basic goods apply equally to all people. You can be self-interested to the extent that you are in the best position to look after yourself, but you should always take into account the good of others.⁶¹

4. Detachment

You should make sure that you do not become obsessed with a particular project, and keep the perspective that the project is a participation of a basic good.⁶²

5. Commitment

You should actually do projects and make an effort to improve – don't just sit around or repeat old habits.⁶³

6. Efficiency, Within Reason

You should calculate and plan your actions so that they are the most efficient and do the most good. One must consider effectiveness, fitness for purpose, utility, and consequences in ensuring that one does not use insufficient methods or waste opportunities.⁶⁴

7. Respect for Every Basic Value in Every Act

You should never commit an act that directly harms a basic good, even if it will indirectly benefit a different basic good. For example, you should not kill even if it will indirectly save more lives later. Finnis urges one to avoid consequentialist reasoning as it is arbitrary and senseless. It is usually the case that individuals will favor or focus on one basic good over the others. However, if one actively opposes a basic good in an effort to act solely in

⁶¹ Id.

⁶² Id.

⁶³ Id.

⁶⁴ Id.

accordance with another basic good, their actions cannot be justified in reason. In every action one makes, every basic value must be at least respected, if it is not to be participated in.⁶⁵

8. *Favoring and Fostering the Common Good of the Community.*

It is in this requirement of practical reasonableness where most of our set moral responsibilities, obligations, and duties have their basis.⁶⁶

9. *Following One's Conscience*

You should act according to *your* conscience and practical reason, not the authority of someone else. The individual's conscience does not necessarily produce a correct judgment, however, the conscious shall be respected in every act, no matter the consequences.⁶⁷

One participates in practical reasonableness simply by participating in the other basic goods appropriately (i.e. not overlooking or over participating in one basic good). Essentially, one should think reasonably in accordance with the nine requirements of practical reason to maximize participation in the basic goods.

Finnis considers the common good something that one can participate in but not achieve. The more one participates in the basic goods, in a community of others that are participating in the basic goods, the participation in the common good is maximized. In order to maximize participation in the basic goods within a community there needs to be coordination and authority. It is a delicate balance, that is, promoting autonomy of the individual to pursue their own ends and promoting coordination of society to participate in the common good. The law, essentially the

⁶⁵ Id.

⁶⁶ Id.

⁶⁷ Id.

strongest and most effective sources of authority, is a morally necessary component of a society that maximizes participation in the common good.⁶⁸

c. Practical Reasonableness and Promoting Justice

Laws can serve a basic good directly or indirectly. Laws against physical offenses such as assault or murder are directly protecting the basic good of life. Other laws that indirectly protect the basic goods create a stable society in which people have the freedom and ability to pursue the basic goods (e.g. anti-littering ordinance so people can play and socialize in public places).

In order to be a morally good legal system, the system and a whole and the laws that make it up must be in line with the basic goods practical reason. Finnis sets forth the following requirements for a morally just law; a law should be:

- 1. Prospective, not retroactive*
- 2. Possible to comply with*
- 3. Promulgated*
- 4. Clear*
- 5. Coherent*
- 6. Stable enough that people can use the law as a guide*
- 7. The making of new laws should be guided effectively within the legal system*
- 8. People who have authority should be*
 - A. Accountable*
 - B. Consistent and acting in good faith*

⁶⁸ Id.

According to Finnis, one ought to pursue the basic goods and society should coordinate in order to achieve the basic goods. Additionally, because law is the most effective way of coordinating society, one ought to obey the law.

There is a legal and a moral obligation to obey the law. Where a legal obligation is binary in nature, there are varying degrees in a moral violation of the law. Finnis suggests that a perfect society there would be a law without sanctions for the sole purpose of coordinating people. On the other hand, in an imperfect society, the law would need to be coercive in order to coordinate people who behaved badly or against the law. In the imperfect society scenario, the “bad” people would follow the law to avoid sanction. There are also the people that follow the law simply because they believe that following the law is morally correct.⁶⁹

Finnis applies the methodological requirements of practical reason in order to morally critique a particular law. Practical reasonableness involves two fairly intertwined elements: promoting justice and fostering and favoring the common good of the community. These elements are satisfied when an individual thinks not only of him or herself, but also of the community and common good. This process involves evaluating: (1) other directedness, i.e. one’s relationship with others in the community; (2) duty, i.e. what you have a right to do and what is owed; and (3) equality, i.e. proportionality between individuals.⁷⁰

VII. Finnis on Forfeiture

Finnis asserts that the foremost concern of natural law is establishing and recognizing a system of the common good and determining if and how our legal system works in conjunction with achieving maximum participation in the common good. As discussed above, maximum

⁶⁹ Id.

⁷⁰ Id.

participation in the common good is attained by using practical reasonableness to efficiently participate in the basic goods. Further, a law should be enacted and enforced in accordance with practical reasonableness in order to push society towards the common good.⁷¹

In determining if civil forfeiture laws in New Jersey are morally just and in accordance with Finnis's theory of natural law and natural rights, the first question one must consider is: What is the purpose of civil forfeiture? As discussed in prior sections there are two obvious purposes of civil forfeiture: (1) to punish the criminal in a way that will discourage reoffending and (2) award ill-gotten gains to law enforcement agencies to use for law enforcement purposes (i.e. to aid law enforcement officers in enforcing the law).

a. Civil Forfeiture: Pushing Society Towards or Blocking us from Participation in the Basic Goods?

So long as civil forfeiture is used as the law intended and not abused, this law and practice will push society towards participation in the basic goods.

1. Life

Civil forfeiture encourages participation in life. Civil forfeiture allows the community, excluding any criminal offenders, to strive for self-preservation, bodily health, mental health, and freedom from pain. By seizing drugs, money to purchase drugs, housing used to commit prostitution and other crimes, law enforcement officers are helping the society reach self-determination and the value of life.

⁷¹ Id.

2. Knowledge

Civil forfeiture also encourages participation in knowledge. Often the funds received from civil forfeiture seizures are used for education and training for law enforcement. Some of these opportunities would otherwise be unavailable to law enforcement agencies on strict budgets.

3. Play

Although at first perception it may not seem as though civil forfeiture encourages participation in play, it does, however in an unconventional way. As Finnis shares, play can be participated in in a traditional way such as playing golf with friends or in a much more structured way. In a structured way, civil forfeiture can push towards participation in play in several ways. First, the process of seizing is calculated. Law enforcement officers must consider many factors when determining if they should seize property. These factors, similar to calculations exercised during a game of chess or cards, may lead the law enforcement officer to seizing property that can earn their agency a large amount of funds or a headache of a case that costs more to bring to court than the value of the property seized. Although civil forfeiture is certainly highly structured, it does push participation in play.

4. Aesthetic Experience

Also, in a nontraditional sense, civil forfeiture pushes society towards participation in aesthetic experience. Through civil forfeiture, a house that was once used as a prostitution den could be seized and turned into a local community center, youth center, drug rehab, etc. Funds gained from civil forfeiture actions could be used to increase security in a town, fund overtime for officers to patrol a dangerous section, or add other security measures in a town. Whether the funds are used to physically alter a property or whether they are used to increase security so society may better enjoy their community, civil forfeiture is increasing participation in aesthetic experience.

5. Friendship and Sociability

Civil forfeiture promotes the good of friendship between law enforcement agents and the communities they serve. Using the funds gained from civil forfeiture actions, law enforcement agencies are able to enhance the communities they serve by creating programs such as educational programs for teens and seniors, gun buy-back programs, prescription drop-off sites, etc. Programs such as these opportunities for the formation of friendship that may not otherwise be available. Civil forfeiture brings the community together and promotes increased interaction between members of the law enforcement agencies and members of the community they serve.

6. Religion

Religion is not among the basic good directly promoted by civil forfeiture laws but churches may be among the institutions benefiting from the activities and programs created with funds obtained through civil forfeiture proceedings. Civil forfeiture is a part of law, as such it is an order of things that transcends individual interests. Therefore, civil forfeiture, as a piece of all of the laws that apply to society, does promote participation in the basic goods of religion.

7. Practical Reasonableness: Is Practical Reasonableness Exercised in Civil Forfeiture Law and Practice?

In order to maximize participation in the basic goods, one must use practical reasonableness in making decisions. Therefore, for civil forfeiture law and practice to truly promote participation in the basic goods, it must be practically reasonable.

i. Rational Plan of Life

Civil forfeiture law and practice is a part of a rational plan for the community. It is not only a coherent approach to discourage and prevent crime by reducing the capacity of criminals, it is

also entirely consistent with the constitution and other laws aimed at reducing crime and promoting the common good of the community.

ii. No Arbitrary Preference Amongst Values

In the enforcement of civil forfeiture law, there is no arbitrary preference amongst values. Civil forfeiture promotes the life, knowledge, play, aesthetic experience, sociability and practical reason and does not arbitrarily discount the value of religion.

iii. No Arbitrary Preference Amongst Persons

Civil forfeiture law presents no arbitrary preference amongst persons. Although civil forfeiture laws prefer law enforcement agents and those that benefit in some way from the assets seized over criminal defendants, there is good reason to do so. It promotes the common good of the community, discouraging and preventing crimes, but taking assets that can be used in crimes as well as the fruits of criminal acts and enhancing the efforts of law enforcement agencies that are often underfunded. Some have argued that civil forfeiture targets the indigent but that seems very unlikely. The very object of the law is to obtain assets from criminals, whether rich or poor. It makes little sense to target indigents who have essentially nothing of value.

iv. Detachment

Civil forfeiture is a means of preventing and discouraging crime and to provide additional assets to law enforcement agencies but there does not appear to be any evidence of a fanatical pursuit of those legitimate goals.

v. Commitment

Civil forfeiture has improved since the law was enacted. As discussed in prior sections, civil forfeiture statutes have been amended to include innocent owner defenses and various other

guards to protect innocent parties and society as a whole. Thus, the efforts to improve the law reflects a continuing commitment to promote its legitimate purpose.

vi. Efficiency

There will always be debate about the best method for discouraging recommitting. However, civil forfeiture is arguably one of the most efficient methods to discourage and prevent crime while at the same time, promoting the common good by incapacitating criminals and enhancing the capacity of law enforcement agents to serve the community with seized assets.

vii. Respect for Every Basic Value in Every Act

Civil forfeiture laws do not in any way violate this requirement by directly attacking a basic value.

viii. Favoring and Fostering the Common Good of the Community

Civil forfeiture law sets forth procedures and practices that impose duties on those with the authority to enforce it and those with a duty to comply with it. This process ultimately promotes participation in the basic goods, which in turn, fosters and favors the common good of the community.

ix. Following One's Conscience

This is quite possibly the most important factor in determining the practical reasonableness of civil forfeiture law and practices. The authority of civil forfeiture law is clear. However, like with many laws, there may be a situation where the law calls for one action, but your conscious calls for another. In the practice of civil forfeiture law, it is important for law enforcement agencies to not blindly follow the law and incidentally discount an individual or one of the basic goods. Support for and acquiescence in its enforcement is as it is enacted and as currently enforced is in accord with the principle that one should follow one's conscience. practiced currently and routinely does not disrespect the conscious.

b. The Common Good

Civil forfeiture laws and practice serve to promote the common good by discouraging and preventing crime by depriving criminals of the use of their asset and the fruits of their crimes and enhancing the ability of law enforcement agencies to police and prosecute crimes.

c. Promoting Justice with Civil Forfeiture Law and Practice

As discussed in prior sections, Finnis sets forth requirements for a morally just law. Civil forfeiture laws in New Jersey meet all of these requirements.

Civil forfeiture laws in New Jersey are prospective, possible to comply with, promulgated, clear, coherent, and stable. Those with the authority to enforce the law cannot escape accountability for arbitrary and bad faith application. Indeed, with every law there is a potential for abuse, but holding those who violate their duty to administer the law according to its tenor would need to be done on a case-by-case basis. There is nothing in the law that violates the requirements of commutative or distributive justice. Therefore, Finnis would consider civil forfeiture to be a morally just law.

VIII. Conclusion

For all the reasons set forth above I have concluded that New Jersey's civil forfeiture law meets the requirements of practical reasonableness set forth by John Finnis in *Natural Law & Natural Rights*.⁷² On the basis of the forgoing analysis I have concluded that Civil forfeiture laws and practices in New Jersey are morally justified as a an appropriate means to promote the common good of the community.

⁷² Id.